No. 79-1794

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

*Petitioner,*

—v.—

GEORGE SUMMERS,

*Respondent.*

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF MICHIGAN

## BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

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## INTEREST OF AMICUS CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 200,000 members, dedicated solely to defending the principles of freedom embodied in the Bill of Rights.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment of the United States Constitution. That Amendment erects a critical barrier between the government and the citizen, and it defines the standards the government must follow whenever it seeks to invade "the right of the people to be secure in their persons."

The ACLU has participated in numerous cases, including Dunaway v. New York, 442 U.S. 200 (1979), in which we have urged the Court to adopt a "strict construction" of the Fourth Amendment. The purpose of this

amicus brief, however, is to argue that the Court should not reach the Fourth Amendment issues raised by Petitioner, but should instead dismiss the writ of certiorari as improvidently granted.

Counsel for both Petitioner and Respondent have consented to the filing of this brief. Copies of the letters of consent are being filed with the Clerk.

## STATEMENT OF THE CASE

1. Seven Detroit police officers arrived shortly after 10:00PM on October 10, 1974, to execute a warrant to search a two-story private house. The warrant authorized the officers to search the premises and seize heroin and any other narcotics and paraphenalia found, but did not by its terms authorize the search of persons found on the premises. The owner of the house was not named in the search

warrant. [1] The affidavit in support of the search warrant, however, stated that an informant had purchased heroin at that house the day before.

As the officers arrived at the house, Officer Lehman saw a man (later identified as defendant Summers) leave the front door of the house and walk down the front porch steps. After identifying themselves as police, and ascertaining that the man lived in the house he had just left, the police told him to open the door of the house. Defendant Summers was not at that time asked

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[1] Although the Michigan Supreme Court Opinion correctly states that the owner of the house was not named in the search warrant, the Michigan Court of Appeals states the contrary, noting, however, that a copy of the search warrant did not appear in the record. It is not clear from the papers submitted by the parties when the search warrant and affidavit, found at pp. 60-61 of the Joint Appendix (hereinafter JA) became part of the record, or whether they are part of the record at all.

his name, nor was he frisked for weapons. Summers replied that he was unable to open the door because he had left his keys inside, but he could ring someone over the intercom.

Summers then went to the porch, pushed the buzzer and spoke to someone inside named "Dwight". Dwight Calhoun opened the main door, but when the police identified themselves, and attempted to open the locked storm door, he slammed shut the inner door. Some of the police officers then knocked down the front doors and entered the house.

Officer Lehman instructed Officer Conant, previously stationed along the side of the house, to bring Summers, still on the porch, into the house. Officer Conant kept Summers in the living room while the house was secured. Meanwhile, Officer Lehman pursued Calhoun into a downstairs bedroom and placed him under arrest after seeing him toss

a pack containing suspected heroin on the bed, and brought him upstairs to the living room. Other persons were found in the house and brought to the living room by other police officers. A total of eight persons, including Calhoun and Summers, were detained by the police while the search was conducted. 2/

After finding suspected narcotics concealed under a bar in the basement and determining from questioning Summers that he was the owner of the house, Officer Conant formally arrested Summers for violation of the Controlled Substances Act of 1971. A search of Summers incident to that arrest revealed a packet of suspected heroin in his jacket pocket. The possession of the heroin found in his jacket formed the basis

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2/ The duration of the search cannot be determined from the record.

of the charge ultimately brought against him. [3] He was never prosecuted for possession of the narcotics found in the basement.

2. Following a preliminary examination, Summers was bound over for trial. The trial court granted his motion to suppress the evidence seized from his person and quashed the information. At the hearing on the motion to suppress, the prosecutor conceded that the state did not have probable cause to arrest Summers when he was outside the house, JA 53-54, but argued that the detention outside the house was a valid investigatory stop by officers armed with a premises search warrant, and that there was probable cause to arrest

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[3] Mich. Comp. L. Ann. 335.341(4)(a)(West 1975), repealed in 1978, Mich. Pub. Acts of 1978, No. 368 §25101, and recodified as Mich. Comp. L. 333.7403(1)(West Supp. 1980).

Summers after the heroin was found in the basement and it was ascertained that he was the owner of the house. JA 53, 56. The trial court found that Summers had been brought back into the house involuntarily. In addition, the court concluded that under state law, People v. Davenport, 39 Mich. App. 252, 197 N.W. 2d 521 (1972), the police lacked probable cause to arrest Summers in connection with the drugs found in the basement. Therefore, the heroin found in his pocket was the fruit of an illegal arrest. JA 58.

3. The Michigan Court of Appeals affirmed. It rejected on state law grounds the prosecutor's argument, made for the first time on appeal, that the search of Summers' person was authorized by the warrant to search the premises, on the theory that defendant's clothing was a "place where"narcotics could be located. The court also rejected on state law grounds the argument that the

search was justified because of Summers' ownership of the house, his presence "on the premises", and the "reasonable expectation" that heroin would be found on his person. The court, noting that Summers had been stopped outside the house and therefore was not "present upon the premises" to be searched when the officers arrived, determined that this case did not present the proper occasion to decide the open question under state law of "the extent to which persons found on the premises as a search warrant is executed can be searched without another warrant." However, the court did conclude under state law that a search warrant does not authorize the search of someone found "outside" the premises to be searched. Appendix to Petition for Writ of Certiorari ("A"), at A 5-6. The Court declined to decide whether taking Summers back into the house constituted an unlawful deten-

tion under state or federal law. A 6-7. The court agreed with the trial court that the police, under People v. Davenport, supra, lacked probable cause to arrest Summers after the drugs were found in the basement because there were no factors, independent of his ownership of the house, linking Summers to the drugs found. A 11-12. The court concluded that the heroin seized from his person was inadmissible as the fruit of that unauthorized arrest.

4. The Michigan Supreme Court affirmed on a different ground. Instead of reaching the question of the validity of the arrest or of the search under state law, it held that detaining Summers while the search warrant was being executed, before he was arrested or searched, violated the Fourth Amendment. Applying Dunaway v. New York, 442 U.S. 200, (1979) and Terry v. Ohio, 392 U.S. 1 (1968), and its progeny,

the court determined that the in-house detention of Summers would have been reasonable only if supported by probable cause to arrest:

> To sanction a further detaining of defendant without probable cause would in effect replace the fundamental and essential probable cause standard with a multi-factor balancing test specifically rejected by the United States Supreme Court in Dunaway. A 22.

Because, in the court's view, the police did not then have probable cause to believe Summers had committed a crime, the heroin seized from his person had to be excluded as the fruit of an unlawful "arrest", (i.e., the detention).

This Court granted certiorari on October 14, 1980.

## SUMMARY OF ARGUMENT

The writ of certiorari should be dismissed as improvidently granted because it is not necessary, in the circumstances of this case, for the Court to resolve any federal constitutional issues. Even if the Court were to conclude that the in-house detention of respondent did not violate the Fourth Amendment, the illegality of his subsequent arrest and search, as determined by the courts below on state law grounds, would require the same judgment. To avoid rendering an advisory opinion, the Court should decline to resolve the federal constitutional issues raised by Petitioner. Point I.

If the Court reaches the in-house detention issue, the detention should be held an unreasonable seizure of respondent's person under the Fourth Amendment. The categorical exception to the probable cause

requirement urged by the state for detention of persons "on or departing from" the premises during execution of a search warrant "until the search is completed," should be rejected as unconstitutional under the test adopted by the court in Terry v. Ohio, 392 U.S. 1 (1968), because the exception would not advance any important governmental objectives, and would be very intrusive. Point II.

Finally, this is not an appropriate case in which to consider adoption of a "good faith" exception to the exclusionary rule. The trial court suppressed the evidence under state law as the direct fruit of an illegal arrest. Even if the police acted in "good faith" at the time of the detention, their "good faith" would not justify an exception to the

exclusionary rule if they acted in "bad faith" when they later arrested and searched respondent Summers. Point III A. Furthermore, a "good faith" exception to the exclusionary rule should not be applied here where their good faith could not be justified by reliance on established statutory or constitutional authority. Point III B.

## ARGUMENT

### I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED.

The Michigan Supreme Court held that the detention of defendant Summers "prior to execution of the premises search warrant" constituted an "arrest" without probable cause in violation of the Fourth Amendment. A 16, A 18, and A 22-23. The state does not contend that there was probable cause for an arrest during the initial period of detention prior to the finding of narcotics in the searched premises. [4/] Rather, the state contends only that the initial deten-

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[4/] The state does contend that the subsequent finding of narcotics on the premises, coupled with Summers' acknowledgement that he was the owner of the premises, did establish probable cause to arrest him. The Michigan Supreme Court did not address this contention, and it is irrelevant to our argument here.

tion was so much briefer and less intrusive than a typical arrest that it should not be considered an "arrest", but only a stop, and that such stops do not have to be based on probable cause, so long as they are reasonable. (Pet. Br. 10).

Whether the initial detention at issue in this case was an "arrest" within the meaning of the Fourth Amendment is a complex and important question. But it is a question that need not, and should not, be resolved in this case. Even if this Court were to rule that the state is correct, and that the initial detention was not an "arrest", and therefore did not require probable cause, and were to rule, in addition, that the detention was "reasonable" under the circumstances, the consequence of those rulings would simply be that the state could constitutionally detain Summers in the house, just as it detained the other

seven occupants of the house. [5] But the state does not contend that a non-arrest detention authorizes a full-scale search incident to the detention. [6] Whether the state could subsequently "arrest" or "search" Summers would have to be determined first by reference to state law and then, if state law permitted the arrest or search, by reference to the Fourth Amendment.

In the circumstances of this case, as we show infra, state law did not permit either an arrest or a search of Summers,

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[5] The United States, as amicus curiae urges the Court not to decide the second question (whether the search was reasonable) on the present record, but to remand for consideration of relevant facts, including the duration of the detention. (U.S. Br., Point IB)

[6] This Court has ruled that police can "frisk" or "pat down" a non-arrested but detained person, in order to find weapons, if they reasonably suspect that the person is armed and might injure them. But that limited
(footnote cont'd on next page)

even after narcotics were found on the premises of which he was the acknowledged owner. Accordingly, exclusion of the evidence found pursuant to the search of his person was required as a matter of state law (as the trial court and the Court of Appeals both found). Since the evidence would be excluded in order to enforce state law, it would not be necessary for this Court to decide whether the exclusionary rule should apply in the circumstances of this case in order to enforce the Fourth Amendment, or whether the Fourth Amendment permits "a search of reasonable scope and intensity of persons on the pre-

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(footnote cont'd from previous page) weapons frisk does not authorize the full scale search of a person that occurred in this case. And the Michigan Supreme Court found as a fact that "the defendant's conduct at no time gave a basis for the officers to suspect unlawful activity on his part or to fear for their safety. Indeed, the officers chose not to frisk the defendant." A 22.

mises during a lawful search." [7] Where, as here, state law forbids a search, it is not necessary to decide whether the Fourth Amendment would permit one.

Thus, since the evidence would be suppressed under state law, regardless of whether the initial detention was constitutional under the Fourth Amendment, a decision by this Court on the constitutionality of the detention would be in the nature of an advisory opinion. [8]

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[7] Although the evidence found on defendant's person would not have been found but for his "detention," and would be excludable as a fruit of that detention, were it held unconstitutional, the evidence was actually found as a result of his subsequent arrest for possession of the narcotics found in the basement, and was therefore excludable under state law as the direct product of an unlawful "arrest."

[8] As Justice Jackson wrote in Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945):

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and
> (footnote cont'd on next page)

Whenever there are independent and adequate state grounds for a ruling, or even ambiguity as to whether that ruling rested on state or federal grounds, the Court should decline to decide the federal question asserted to be present. See, e.g., State of California v. Krivda, 409 U.S. 33 (1972); see also Mental Hygiene Department of California v. Kirchner, 380 U.S. 194 (1965). Thus, consistent with

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independent state grounds....The reason is so obvious that it has rarely been thought to warrant a statement, it is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. (emphasis added).

"the policy of not passing upon questions of a constitutional nature which are not clearly necessary to a decision of the case," Minnesota v. National Tea Company, 309 U.S. 551, 555 (1940), the Court should decline review of the Fourth Amendment issues and dismiss the writ of certiorari as improvidently granted.

### A. Defendant's Arrest And The Search of His Person Incident to That Arrest Were Not Authorized Under State Law.

At the trial court level, the sole argument advanced by the state to justify the search of defendant's person was that the search was incident to a valid arrest. [9] JA 53-57. The state sought to justify the arrest on the ground that the finding of

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[9] In the Court of Appeals the state claimed, in addition, that the search of defendant's person was directly authorized by the warrant to search the premises. We will discuss that claim in point I B infra.

narcotics on the premises, coupled with defendant's acknowledgement that he was the owner of the premises, was sufficient to constitute probable cause for an arrest. JA 56.

The trial court ruled, as a matter of state law, that the presence of narcotics in the premises coupled with defendant's ownership of the premises did not constitute probable cause to believe that defendant had committed the crime of "knowing possession," as defined by Michigan law. JA 55-58. [10] The authority relied

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[10] And in fact, the state never indicted or prosecuted defendant Summers for possession of the narcotics found in the basement, only for the narcotics found on his person after he was arrested. If the state really believed the arrest was based on probable cause, it is difficult to understand why defendant was not prosecuted for possession of the narcotics found in the basement.

upon by the trial court for that ruling was a Michigan case, People v. Davenport, 39 Mich. App. 252, 197 N.W. 2d 521 (1972), JA 56. Davenport made clear that Michigan law defines the crime of "knowing possession" of narcotics quite narrowly. The Michigan statute under which defendant Summers was arrested provides: "It is unlawful for any person knowingly or intentionally to possess a controlled substance...." Mich. Comp. L. Ann. 335.341(4)(a)(West 1975). Basically, under Michigan law, the mere presence of narcotics in a house, coupled with a defendant's non-exclusive occupancy (or ownership) of the house, does not constitute "knowing possession" or warrant an inference that the defendant knowingly possesses the narcotics.

If other occupants of the house "had equal access" to the area where the narcotics were found, it "is not reasonable to infer"

that one occupant, rather than another, was the possessor. Davenport, 39 Mich. App. 256-257, A 8. That is so because Michigan law precludes a finding of knowing possession whenever there are "innocent theories -- unrebutted by any evidence -- which accord with the facts." Davenport, id., A 8. Thus, under Michigan law, as interpreted by the state's single Court of Appeals, whenever persons other than the defendant had equal access to the searched premises, "an additional independent factor linking the defendant with the narcotic must be shown." Davenport, id., A 8.

On appeal, the Court of Appeals agreed that People v. Davenport was "controlling", A 7, and affirmed the trial court's conclusion that there was no probable cause to arrest and that "the seizure of the heroin involved here cannot be justified as the product of a search incident to arrest." A 11-12.

The Court of Appeals acknowledged that there is a difference between the "quantum of proof" necessary to support a conviction, and to support an arrest, but ruled under Michigan law that "there still must be some evidence of the type or quality necessary to support a conviction" in order to justify an arrest. A 9. It concluded that "there must be at least some evidence of an additional independent factor linking the defendant with drugs found on the premises, although the weight to be given to the factor need be less to support an arrest." A 9. The Court of Appeals found (and this is not seriously disputed) that "in the instant case, none of those additional factors were present." A 11. Thus, under Michigan law, the officers did not have sufficient "additional evidence" to justify arresting Summers "for knowingly possessing the drugs

found in the basement of his house." A 12. [11]

On further appeal, the majority of the Michigan Supreme Court did not find it necessary to decide the validity of the arrest under People v. Davenport. But there is no reason to suppose the majority would not have found Davenport controlling, if it had reached that issue. Although the dissent argued that Davenport was not controlling and that "the Court of Appeals reliance" on Davenport "was misplaced", A 39, the majority did not adopt

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[11] It is at least arguable (although we would have a different view), that Michigan could define its crime of possession of narcotics more broadly, and could eliminate its requirement of "some additional evidence" to justify an arrest or perhaps its requirement of "knowing" possession , without violating federal constitutional provisions. But certainly Michigan can choose substantive and evidentiary rules that are more protective of the liberty of potential defendants than would be required by federal law.

that view and there is no reason to suppose the majority would adopt such a limiting construction of Davenport. To the contrary, Judge Levin, who wrote the opinion in Davenport while he was a judge on the Court of Appeals, joined the majority opinion in this case. 12/

B. Under State Law, The Warrant to Search The Premises Did Not of Itself Authorize A Search of Defendant's Person.

In the Court of Appeals the state argued for the first time that under the Michigan statute authorizing the issuance

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12/ Even if it is not absolutely certain that the Michigan Supreme Court would find Davenport controlling, the express reliance on Davenport by the trial court and the Court of Appeals should be dispositive here. Certainly, in these circumstances, this Court could not conclude that the arrest was authorized by Michigan law without at least remanding to the Michigan Supreme Court for clarification.

of search warrants, the search warrant for the premises authorized the search of defendant's person even if there were no arguable basis for an arrest -- i.e., even before narcotics were found on the premises, and even if narcotics had never been found on the premises. The Court of Appeals rejected "all of these legal bases for the search", A 5, and did so on state law grounds. 13/

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13/Contrary to the state's argument, federal law would also compel the conclusion that the search of defendant's person cannot be justified by the premises search warrant itself. The state argues that a search of defendant's person is no different from a search of a "container" or other inanimate object found on the premises because "the pockets of persons are places within the premises just as are desk drawers and closets." (Pet. Br. 27). This argument is inapplicable here because defendant was found outside the place to be searched and, unlike the cases cited by the state, his leaving was not triggered by the arrival of the police. Furthermore, it ignores the separate notion of personal privacy and autonomy reflected in the language of the Fourth Amendment, which expressly distinguishes between "persons" (footnote cont'd on next page)

The Court of Appeals concluded that the "prosecutor misses the point of the statute," A 5. That court construed the statute to provide that "the magistrate could have issued a warrant to search any individual found on the premises, but he did not do so." A 6. The Court of Appeals then ruled, as a matter of law, that the Michigan statute authorized the

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or "things" to be searched or seized. The only circumstances in which the state would require this additional authority to search persons pursuant to a premises search warrant are situations where the state would not otherwise have probable cause or constitutional authority to arrest or search. Such an extension of the scope of a premises search warrant would constitute general authority to search all those found on the premises or even all persons connected with the premises, wherever they are found. Because open-ended or general warrants are constitutionally prohibited under the Fourth Amendment, "a warrant to search a place cannot normally be construed to authorize a search of each individual in that place," Ybarra v. State of Illinois, 444 U.S. 85, 92 n.4 (1979), and it certainly should not be construed to authorize search of a presumptively innocent person not found on the premises.

search of persons on premises to be searched if, and only if, they were named in the search warrant.

The Court of Appeals did not reach the state's second argument -- that presence "in the house" could justify a search of the person even if that person's clothing would not be considered a "place" within the meaning of the state statute -- because respondent was not found in the house. But the court ruled, under state law, that no state interest justified the search of persons found outside the premises. A 6-7.

In summary, since neither the arrest nor the search of respondent were authorized by state law, it is not necessary for this Court to decide whether the initial detention which led to the arrest and search was constitutional; even if it were, the evidence seized from his person would have been suppressed as a matter of state law. Accordingly, the writ should be dismissed as improvidently granted.

## II. IF THE COURT DECIDES THE CASE IS PROPERLY BEFORE IT, THE IN-HOUSE DETENTION OF RESPONDENT DURING THE EXECUTION OF THE SEARCH WARRANT SHOULD BE HELD AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.

If the Court rejects our argument that the writ of certiorari should be dismissed as improvidently granted, and therefore reaches the question of the constitutionality of the in-house detention of Summers, the detention should be held an unreasonable seizure [14] of his person under the Fourth Amendment.

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[14] The police clearly "seized" Summers within the meaning of the Fourth Amendment when they detained him on the front porch and brought him into the house. Seizures of persons include arrests, e.g., Henry v. United States, 361 U.S. 98 (1959), investigatory detentions, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969), and any other detention of persons against their will. See e.g., Brown v. Texas, 443 U.S. 47, 50 (1979); Dunaway v. New York, 442 U.S. 200, 207 n.6 (1979). All that is required is that an "officer, by means of physical force or show (footnote cont'd on next page)

Traditionally, the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of probable cause to arrest. See, e.g., Brinegar v. United States, 338 U.S. 160, 176 (1949). The Court first departed from the rule that probable cause must justify all police seizures in Terry v. Ohio, 392 U.S. 1 (1968). As discussed in Dunaway v. New York, 442 U.S. 200, 219 (1979), Terry departed from traditional Fourth Amendment analysis in two respects:

> First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests that the general rule requiring

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(footnote cont'd from previous page) of authority, has in some way restrained the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). Here the trial court found that Summers was involuntarily taken into the house by the police. JA 58.

> probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.

Thus, the reasonableness of certain seizures that are substantially less intrusive than a traditional arrest depends on "a balance between the public interest and the individual's right to personal security free from arbitrary interference" by police. Brown v. Texas, 443 U.S. 47, 50 (1979), quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

The Court has been careful to maintain Terry's narrow scope by permitting "stops" on less than probable cause only in two very limited categories of cases.

The first, outlined by Terry, is a limited on-the-street stop by police, based on "specific and articulable facts," to investigate suspicious persons or circumstances, and a frisk for weapons when police have "reasonable grounds to believe" that the person stopped is armed and dangerous. Terry v. Ohio, supra at 21; Sibron v. New York, 392 U.S. 40, 63 (1968); see Adams v. Williams, 407 U.S. 143 (1972). This categorical exception permits an officer to order a driver to get out of his or her vehicle after the vehicle has been lawfully detained for traffic violations, and permits a frisk of the driver if the officer has a reasonable suspicion that the driver is armed and dangerous. Pennsylvania v. Mimms, supra. The Court again emphasized the safety of the officer as compared to the "de minimis" intrusion of the requirement to exit the vehicle once it had lawfully been stopped. Id. at 111.

The second category arises in the special context of brief interrogation stops near the United States border to check suspicious automobiles for illegal aliens, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), or a fixed checkpoint to stop and check automobiles for aliens. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Even in the context of border patrol stops, however, the officer may briefly question the driver and passengers about their citizenship and immigration status and any suspicious circumstances, but "any further detention or search must be based on consent or probable cause." United States v. Brignoni-Ponce, supra at 881-822; Accord, United States v. Martinez-Fuerte, supra at 567.

In the instant case, the state urges the Court to extend Terry in order to approve a third category of "seizures" on

grounds less rigorous than probable cause: detentions of persons "on or departing from" [15] the premises during execution of a search warrant "until the search is completed." (Pet. Br. 13). The state concedes that whether particular detentions of that type are constitutionally permissible should not be left to the ad hoc judgment of the police on a case-by-case basis, and argues instead that all such detentions should be authorized in advance by the Court as a "generic" exception to the probable cause requirement. (Pet. Br. 11-12). [16]

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[15] Summers was departing from the house when the police arrived. This case does not therefore raise the issue of the constitutionality of detentions of persons found inside the premises to be searched.

[16] The United States takes the position, as amicus curiae, that the Terry balancing test should be applied by police on a case-by-case basis, and that "extended detentions of limited duration can comport with the demands
(footnote cont'd on next page)

Such a categorical exception to the probable cause requirement is not justified, in the circumstances of this case, under the balancing test adopted by this Court for determining the constitutionality of such seizures.

As both the state and the amicus brief of the United States acknowledge, and as this Court ruled in Brown v. Texas, supra

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of the Fourth Amendment if they are reasonable in light of the circumstances confronting the officers at the time." (Amicus Br. of United States, Summary of Argument) However, the problems inherent in application of a multi-factored balancing test on a case-by-case basis are well-recognized by the Court. See Dunaway v. New York, supra at 214. As conceded by the state, the "balancing test is 'too subtle and sophisticated a device to be workable in day-to-day practice,'" and it would be "'clearly asking too much to expect policemen to make on-the-spot judgments in this way....'" [citation omitted]. (Pet. Br. 11-12).

at 51, the constitutionality of an exception to the ordinary requirement of probable cause "involves a weighing" of (a), the "gravity of the public concerns served by the seizure" and the "degree to which the seizure advances the public interest," compared with (b), the "severity of the interference with individual liberty." (Pet. Br. 10; U.S. Br., Point I)

### A. In The Circumstances Of This Case, The Categorical Exception Urged By The State Would Not Advance Any Important Government Interest.

The state has advanced only three governmental interests: 1) protecting the "safety of the officer"; 2) avoiding "frustration of the warrant", and 3) "the warrant itself." (Pet. Br. at 13)

For purposes of this brief, we will assume, arguendo, that protecting the safety of officers and preventing frustration of

search warrants are important governmental interests. Those interests, however, would not be advanced by adoption of a categorical exception for persons who are leaving or who have left the premises to be searched. The third interest addressed by the state is either indistinguishable from the second, or is so broad that it would allow states to arrest without probable cause anyone connected with premises which are the subject of a search warrant, even if those persons are hundreds of miles from the premises and have no knowledge that the search is taking place.

1. Officer safety.

The Michigan Supreme Court found as a fact that respondent's "conduct" did not raise in the officers' minds, or justify, reasonable suspicion of criminal activity, or that he was armed. A 22. If it had, the officer could have detained and frisked him under Terry, and the state would not

need to urge a broader categorical exception in the interests of safety. Accordingly, the state is asking the Court to rule that even if an individual's conduct is not suspicious, that individual may be detained and frisked simply because he or she is leaving premises covered by a search warrant. In effect, the state is asking the Court to create a per se presumption that anyone leaving such premises may reasonably be deemed dangerous to the officers. [17] That presumption

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[17] This case presents the rare circumstance of the police arriving to execute a premises search warrant precisely at the moment someone is leaving the premises and walking down the front porch steps. The infrequency of such an occurrence, and the limited issues raised by such facts, present another basis for the Court to dismiss the petition for certiorari as improvidently granted.

is not reasonable. [18] But even if it were, it would authorize, at most, only a brief stop and frisk for weapons. If no weapons were found, "police safety" would not justify further detention for the duration of the search. [19] Alternatively, if the state is not arguing for the right to frisk, but only for the right to detain,

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[18] In this case, for example, the police did not frisk defendant Summers for weapons either when they detained him on the front porch or when they brought him back into the house to "secure" the premises, and as noted, the Michigan Supreme Court found as a fact that the police did not fear for their safety.

Aside from the unreasonableness of such a per se presumption in the circumstances of this case, however, the presumption is also unreasonable as a general rule. For example, although in this case the police searched a single-family dwelling, other searches could involve multi-story apartment buildings, with many people leaving and entering the premises. It would be unreasonable to presume that all persons leaving the building as the police arrived would present a danger to the officers.

[19] Although it is highly unlikely, it is at least conceivable that further detention is
(footnote cont'd on next page)

it cannot seriously be argued that bringing a possibly armed and dangerous individual inside the searched premises, without a frisk, will promote the safety of the officers in the premises during the search.

2. Frustration of the warrant.

It is at least conceivable that persons inside the premises, if free to roam from room to room, could frustrate execution of a warrant by destroying or

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(footnote cont'd from previous page) necessary to prevent those frisked from going out, acquiring weapons, and returning to confront the police. Such a precaution, however, would also justify the round-up and detention of anyone walking by the premises being searched, or indeed, anyone who might learn of a search in progress. It would also justify preventing those in the searched premises from making or receiving telephone calls during the search. The remote possibility that an unarmed and presumptively innocent person who is not subject to arrest would, if released, acquire weapons and return to attack the police is far too speculative to justify extended detention.

concealing evidence or contraband before the officers reached and searched that particular room. [20] But as the Michigan Court of Appeals noted, A 6-7, persons found outside the premises cannot frustrate execution of a warrant.

Although the state argues that persons leaving the premises could summon help and return to frustrate the warrant, it is highly speculative that this would ever occur. The slight possibility that persons would return and successfully frustrate the execution of a warrant does not justify further detention.

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[20] However, since defendant was found outside the premises, it is neither necessary nor appropriate for this Court to decide in this case whether it would be constitutional to create such an exception for persons already inside the premises. And, as noted, the Court of Appeals expressly declined to reach this question.

3. The "warrant itself".

Frankly, we do not understand this argument. If the state is arguing that a premises search warrant justifies detention of anyone connected with the premises, even if that person could not conceivably frustrate execution of the warrant, that argument would permit the police to range far from the premises, to a person's office, for example, to detain a person connected with the premises until the search is completed. Such a detention could not be justified by the warrant itself.

In short, the categorical exception urged by the state is not necessary to advance any legitimate state interest. Accordingly, the proposed exception would be unconstitutional even if the intrusion on the individual were quite minimal. That should end the inquiry. But as we now show,

even assuming arguendo that important state interests would be advanced by the proposed exception, the intrusion on the individual is so severe that, on balance, the proposed exception should be rejected.

### B. The Intrusion On The Individual That Would Be Authorized By The Categorical Exception Urged By The State Would Be Much More Severe Than The De Minimis Intrusion Authorized In Terry and Mimms.

Balanced against the governmental interests advanced by the state is the severity of interference with individual liberty posed by such a categorical rule. The state argues that the rule should permit detention of persons departing from the premises "until the search is

completed." [21] Pet. Br. 13.

Although it is not clear from the record what the duration of the search was in this case, detention until the search is completed could mean being held on the premises for many hours. [22] Such a deten-

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[21] The United States, as amicus, argues that such detentions are permissible for a "reasonable" period of time, leaving for future litigation whether reasonableness should be measured in the abstract, or in reference to the scope and difficulty of the premises search. If the latter, that rule would itself spawn time consuming litigation on a case-by-case basis. In any event, the state's position is not so limited. The justifications advanced by the state to support detentions during execution of the search warrant presuppose detention of persons on the premises "until the search is completed." Pet. Br. 13.

[22] Depending on the size of the premises, a search for easily concealed items could take many hours. In Harris v. United States, 331 U.S. 145 (1947), for example, an FBI search of a one-bedroom apartment for two checks and burglar tools took five hours. Recent FBI searches of Scientology Church offices have taken between ten and twenty hours to complete. See, e.g., In re Search Warrant, Misc. No. 77-0151 (D.D.C., Aug. 24, 1979).

tion constitutes a particularly severe intrusion when the person has chosen to leave the premises. Thus, persons on their way to work or to an appointment could be detained on the premises for many hours, until the police complete the search. Surely this intrusion is more than "de minimis" and constitutes more than "modest inconvenience" to people detained in a "place they have chosen to frequent," as argued by the state. Pet. Br. 14.

Moreover, taking persons back into the premises during execution of a search warrant could expose presumptively innocent persons to heightened danger from possible resistance to police search by persons inside the premises.

The categorical exception urged by the state could thus intrude on the personal liberty and safety of large numbers of people, for substantial periods of time.

Although the instant case involved a two-story dwelling, such an exception presumably would also sanction detention of all persons leaving a twenty-story apartment building when police arrive to execute a search warrant of an apartment in the building. Application of the exception in such circumstances would result in detention of persons not connected in any way to the specific apartment to be searched. Cf. Ybarra v. State of Illinois, 444 U.S. 85 (1979).

A rule authorizing the seizure of persons leaving the premises when the police arrive to execute a search warrant would not advance any public interest in police safety or in execution of search warrants and would in any event be outweighed by the significant intrusion and interference with individual liberty that would be permitted under such a rule. Thus, in the circumstances of this case, the

Court should not recognize a new categorical exception to the probable cause requirement for extended detentions or arrests.

## III. THE COURT SHOULD NOT APPLY A "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IN THIS CASE.

### A. This Is Not An Appropriate Case In Which To Consider Adoption Of A "Good Faith" Exception To The Exclusionary Rule.

Amicus agrees with the United States, although for different reasons, that this case does not present an appropriate occasion for deciding whether to adopt a "good faith" exception to the exclusionary rule. [23] As discussed supra, Point I,

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[23] The United States, amicus curiae, argues that this case does not present the broad question of a general "good faith" exception to the exclusionary rule because the rule should not be applied under traditional retroactivity principles.

the police did not seize any evidence as a direct result of the detention. Rather, the evidence was seized as the direct result of a search incident to defendant's arrest, which was held, under state law, to be an illegal arrest. The state does not claim that a categorical exception for detention of persons during execution of a search warrant would authorize a search of persons so detained, other than a frisk for weapons, and no such search occurred in this case. If respondent Summers had been detained and searched for weapons as a result of an unconstitutional Terry-type stop-and-frisk, for example, and the police had found heroin or weapons, the question would have been squarely presented whether such evidence should be excluded to enforce the Fourth Amendment. Here, however, the evidence seized was merely an indirect product of an unconstitutional detention, and was suppressable under state law as the direct product of

an illegal arrest.

Similarly, even if we were to assume, arguendo, that the police acted in "good faith" when they unconstitutionally "detained" respondent, their "good faith" at that time would not justify an exception to the exclusionary rule if they acted in "bad faith" when they later arrested and searched respondent (the direct and proximate cause of the illegally seized evidence), in violation of settled state law.

Although the record on this point is incomplete (which itself makes this case an inappropriate occasion to consider adoption of a good faith exception to the exclusionary rule) everything that is in the record points strongly to the conclusion that the officers knew, or should have known, that they did not have probable cause to arrest. Both the trial court and the Court of Appeals ruled that the officers did not have probable cause to arrest under People v. Davenport,

which was decided two years before the arrest. Davenport, like this case, involved an arrest for possession of narcotics found in the basement of a defendant's home. Police officers can reasonably be held responsible for knowledge of settled state law governing arrests for possession of narcotics. 24/ There was never even an attempted prosecution of respondent for possession of the narcotics found in his basement -- the ostensible basis for his arrest. In these circumstances, therefore, the record suggests that the officers acted in "bad faith" when they arrested respondent.

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24/ Since the state law was settled, it is not necessary for this Court to resolve the issue of the "retroactivity" of federal law posed by the United States. U.S. Br., Point II.

B. The Evidence Seized As An Indirect Result Of The Unconstitutional Detention Should Be Excluded Even If The Officers Acted In Good Faith, At That Time.

The state urges the Court to create a "good faith" exception to the exclusionary rule, and it urges the Court to do so even when the officers' actions were not undertaken pursuant to a specific state statute not previously found unconstitutional, or a long-established policy or practice. 25/ The state argues that even if the Court finds that the search of respondent's person cannot be justified as incident to his subsequent arrest

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25/ We believe there should be no such exception even when a presumptively valid statute or long-established practice provide an objective basis for a finding of good faith. But without such an objective basis, a good faith exception to the exclusionary rule would turn almost entirely on subjective and elusive factors and would therefore give more deference to the ad hoc judgments of police than would be consistent with reasonable protection of Fourth Amendment rights.

The state argues also that the exclusionary rule should not be applied if the Court holds that the search of his person was not justified (footnote cont'd on next page)

because the initial in-house detention was unconstitutional, [26] the detention was undertaken by the officers in a "good faith reasonable belief" that it was proper, and therefore the evidence obtained from the unconstitutional search and seizure should not have been excluded. (Pet. Br. 33). The state argues that the purpose of the exclusionary rule will not be served by exclusion of the evidence in this case.

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by the warrant to search the premises. The Court need not, and should not, address this issue because the Michigan Court of Appeals rested its decision on state law, and the Michigan Supreme Court did not reach the issue. Moreover, the officers themselves justified the search as incident to an arrest, not pursuant to the premises search warrant.

[26] The record contains no indication that the police acted pursuant to an express policy or long-standing practice of detaining persons leaving the premises to be searched pursuant to a warrant.

The exclusionary rule serves two important functions. A principal purpose of the exclusionary rule is to deter unlawful police conduct. United States v. Calandra, 414 U.S. 338, 347 (1974). Without it, the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." Mapp v. Ohio, 367 U.S. 643, 655 (1961). It "also serves another vital function -- 'the imperative of judicial integrity.'" Terry v. Ohio, supra at 12-13, quoting Elkins v. United States, 364 U.S. 206 (1960).

These two purposes of the exclusionary rule are closely related and should be viewed as part of a system of deterrence rather than as an "instrument for 'deterring' discrete and specific episodes of unconstitutional police behavior." 27/ See Amsterdam, "Perspectives

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27/ The deterrent effect of the exclusionary rule should not be judged solely by its effect on individual police officers. The rule also serves to deter police departments and state legislatures from adopting policies or laws (footnote cont'd on next page)

on the Fourth Amendment," 58 Minn. L. Rev. 349, 432 (1974):

> The admission of unconstitutionally seized evidence is therefore not, as the critics of the exclusionary rule assume, merely something that happens after "a violation" of the Fourth Amendment has occurred, and when it is too late to prevent, impossible to repair, and senseless to punish the government for that violation. It is the linchpin of a functioning system of criminal administration that produces incentives to violate the Fourth Amendment.[28/]

The exclusionary rule counteracts the incentives toward unreasonable searches and seizures which exist in the system itself.

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(footnote cont'd from previous page) inconsistent with Fourth Amendment rights. See Torres v. Commonwealth of Puerto Rico, 442 U.S. 465 (1979).

28/ The state's brief quotes a previous article by Professor Amsterdam, Pet. Br. 37, in which he takes a position specifically disavowed in his later examination of the purposes of the exclusionary rule. See Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn.L.Rev. 349, 476 n.598.

Under this view of the "general" deterrent purpose of the exclusionary rule, the application of the rule does not depend on the subjective "good faith" of the officers in a specific instance in which Fourth Amendment rights are violated. 29/ Instead, application of the rule depends upon an analysis of whether exclusion of the evidence would serve the purpose of deterring such violations by police, police departments, or legislatures, in the broader context of the overall system of criminal justice. Accordingly, this Court has refused to apply the exclusionary rule only in very limited circumstances and only with respect to peripheral uses of illegally obtained evidence, e.g.,

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29/ There is nothing in the record to indicate whether the individual officers who detained Summers had a "good faith belief" that the in-house detention was lawful.

United States v. Janis, 428 U.S. 433 (1976) (state-seized evidence in an IRS assessment proceeding); Stone v. Powell, 428 U.S. 465 (1976)(collateral federal review of state convictions); United States v. Calandra, 414 U.S. 338 (1974)(grand jury proceedings). The Court has also refused to apply the exclusionary rule in certain cases in which a new constitutional principle is not retroactively applied. See, e.g., United States v. Peltier, 422 U.S. 531, 535 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). The Court, however, has held that the rule requires suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purport to authorize searches without probable cause and without a valid warrant. See, e.g., Torres v. Commonwealth of Puerto Rico, 442 U.S. 465

(1979); Sibron v. New York, 392 U.S. 40 (1968).[30]

Certainly in this case, where the state does not assert that the police were acting in conformity with statutory authority or with established policy, the evidence should not be excluded because of the "good faith" of the officers. Moreover, the Court has consistently reaffirmed the narrow scope of investigatory detentions permitted by Terry, recognizing only two narrow categorical exceptions to the probable cause requirement.[31]

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[30] As noted by this Court, Michigan v. DeFillippo, 443 U.S. 31 (1979) is not inconsistent with these cases. In DeFillippo, the Court upheld the validity of the arrest made for violation of an ordinance later declared unconstitutional, and therefore did not reach the exclusionary rule issue.

[31] See discussion in Point II, supra. Retroactivity principles therefore do not preclude application of the exclusionary rule in this case.

If the exclusionary rule is not applied in this case, the police will be offered an incentive to detain persons in other situations not now covered by a categorical exception. The deterrent value of the exclusionary rule is therefore directly served by exclusion of the evidence in this case. 32/

Finally, if there were a good faith exception to the exclusionary rule, every state court suppression hearing would have to consider not only whether the search was constitutional, but also, if not, whether the officer nevertheless acted in good faith. An exception would require addi-

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32/ Because the deterrent purpose of the exclusionary rule is served by exclusion in this case, we need not consider separately the question of the other function of the exclusionary rule, preservation of judicial integrity. See generally Mapp v. Ohio, supra; Elkins v. United States, supra; Schrock and Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974).

tional evidence and testimony, would cause substantial delays in already clogged criminal justice systems, and would provoke time and resource consuming appeals over the often subtle question of whether the officer acted in good faith.

## CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted. In the alternative, the judgment below should be affirmed.

Respectfully submitted,

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